IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 10, 2007 Session

SARA HUTCHISON v. GREGORY L. RUTT, ET AL.

Appeal from the Circuit Court for Putnam County
No. 04N0253 John Turnbull, Judge

No. M2006-02255-COA-R3-CV - Filed February 25, 2008

In this personal injury action arising from an automobile accident, the defendants, who conceded liability, contest the trial judge's award to plaintiff of $104,043.29 in damages. Having determined the evidence preponderates against the trial judge's determination that the accident caused the plaintiff's migraine headaches and the amount of the award, we modify the judgment by reducing the award of damages to $51,043.29.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed as Modified

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which E. RILEY ANDERSON, SP. J., joined. WILLIAM B. CAIN, P.J., M.S., not participating.

John E. Quinn, Nashville, Tennessee, for the appellants, Gregory L. Rutt and Dollar General Corp.

Randy Chaffin and Craig P. Fickling, Cookeville, Tennessee, for the appellee, Sara Hutchison.

OPINION

This appeal arises out of a automobile accident at the intersection of Interstate Drive and Jefferson Avenue in Cookeville, Tennessee, on July 21, 2003. The vehicle driven by Sara Hutchison (Plaintiff) was rear-ended while stopped in the turning lane at the red light by the vehicle driven by Gregory L. Rutt.

After the accident report was completed, Plaintiff drove to work in her vehicle. During her drive to work, she was experiencing a headache and her nose began to bleed. When she arrived at work she met with her employer, Dr. Donald Grisham.[1] After discussing her discomfort with him, Dr. Grisham gave her permission to leave work early. She then called her father who came to pick her up and take her to the emergency room. Following a routine examination at the emergency

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[1] Plaintiff, at all times relevant to this appeal, worked as a medical assistant for a physician, Dr. Donald Grisham.

room, she was released and told to follow-up with her primary care physician within the week if she did not feel better.

Plaintiff returned to work the day after the accident and worked a full day and did not seek further medical care for six weeks. On September 4, 2003, Plaintiff went to see Dr. Thuy Ngo upon the recommendation of her employer, Dr. Grisham. She informed Dr. Ngo that she was experiencing right-sided headaches and shoulder and arm pain, which she attributed to the accident with Mr. Rutt on July 21, 2003. During the initial visit, she also reported a history of migraine headaches, and that such headaches tended to run in her family. Dr. Ngo performed a thorough office examination of Plaintiff and additionally ordered an EMG and MRI. The results of Dr. Ngo's examination and both diagnostic tests were normal.

After this initial visit, Plaintiff saw Dr. Ngo on a continuing basis until April 13, 2006. During the course of treatment with Dr. Ngo, Plaintiff continued to receive treatment for headaches and problems with the prescribed medications.

Plaintiff was involved in two additional automobile accidents during the course of Dr. Ngo's treatment. The first of these accidents occurred in November of 2004 when she was again struck from the rear. She sustained a whiplash injury as a result of the November 2004 accident. Then on April 9, 2006, Plaintiff was involved in a much more serious accident in which her vehicle was, again, hit from the rear, the force of which pushed her car forward resulting in a head-on collision with yet another vehicle. Plaintiff's vehicle[2] was "totaled" as a consequence of the rear-end and front-end collision on April 9, 2006.

On June 15, 2004, Plaintiff filed this negligence action against Defendants, Gregory L. Rutt, the driver, and Dollar General Corporation, his employer, for damages arising out of the July 21, 2003 automobile accident.[3] When the case went to trial, it was undisputed that Plaintiff was not at fault. The issues at trial were the extent of Plaintiff's injuries resulting from the accident and the amount of damages she was entitled to receive. Following a bench trial, the trial judge, sitting without a jury, awarded Plaintiff the following damages:

Past Medical Expenses	$6,043.29
Past Pain & Suffering	$38,000.00
Future Pain & Suffering	$15,000.00
Past Loss of Enjoyment of Life	$20,000.00
Future Loss of Enjoyment of Life	$10,000.00

[2]Plaintiff was a passenger in the vehicle that was totaled, which was owned and being driven by another person.

[3]In the Complaint, the corporate defendant was identified as Dolgencorp, Inc., not Dollar General Corp. The parties later stipulated that the correct corporate defendant in this case was Dollar General Corp.

Disability	$15,000.00
TOTAL	**$104,043.29**

Defendants appeal contending the evidence does not support the award of damages and specifically that the award of $104,043.29 was excessive under the facts of this case and in light of Plaintiff's prior medical history of migraines and subsequent automobile accidents.

STANDARD OF REVIEW

In this non-jury case, our standard of review of the trial court's findings of fact is *de novo* and we presume that the findings of fact are correct unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Rawlings v. John Hancock Mut. Life Ins. Co.*, 78 S.W.3d 291, 296 (Tenn. Ct. App. 2001). The question as to the "amount of damages to be allowed presents an issue of fact upon which the judgment of the trial judge sitting without a jury is reviewed by this Court *de novo* upon the record with a presumption of correctness unless the evidence preponderates otherwise." *Armstrong v. Hickman County Highway Dep't*, 743 S.W.2d 189, 195 (Tenn. Ct. App. 1987). For the evidence to preponderate against a trial court's finding of fact, it must support another finding of fact with greater convincing effect. *Walker v. Sidney Gilreath & Assocs.*, 40 S.W.3d 66, 71 (Tenn. Ct. App. 2000); *The Realty Shop, Inc. v. R.R. Westminster Holding, Inc.*, 7 S.W.3d 581, 596 (Tenn. Ct. App. 1999). Where the trial court does not make findings of fact, there is no presumption of correctness and we "must conduct our own independent review of the record to determine where the preponderance of the evidence lies." *Brooks v. Brooks*, 992 S.W.2d 403, 405 (Tenn. 1999). We also give great weight to a trial court's determinations as to witness credibility. *Estate of Walton v. Young*, 950 S.W.2d 956, 959 (Tenn. 1997); *B & G Constr., Inc. v. Polk*, 37 S.W.3d 462, 465 (Tenn. Ct. App. 2000).

The weight, faith and credit to be given to a witness' testimony lies with the trial judge in a non-jury case because the trial judge had an opportunity to observe the manner and demeanor of the witnesses during their testimony. *Roberts v. Roberts*, 827 S.W.2d 788, 795 (Tenn. Ct. App. 1991); *Weaver v. Nelms*, 750 S.W.2d 158, 160 (Tenn. Ct. App. 1987). In reviewing documentary proof such as deposition testimony that was presented to the trial court, "all impressions of weight and credibility are drawn from the contents of the evidence, and not from the appearance of witnesses and oral testimony at trial." *Wells v. Tennessee Board of Regents*, 9 S.W.3d 779, 783-84 (Tenn. 1999) *rev'd on other grounds*, 231 S.W.3d 912 (Tenn. 2007). An appellate court "may make an independent assessment of the credibility of the documentary proof it reviews without affording deference to the trial court's findings." *Id.* at 783. When the proof is presented through a deposition, the appellate court can just as well judge the credibility of the witness as the trial court. *Id.* 784. There is no presumption of correctness with respect to the trial court's conclusions of law. *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn. 1999).

ANALYSIS

Defendants admitted liability; therefore, the sole issue is whether the evidence preponderates against the trial court's award of damages totaling $104,043.29. We have determined it does.

A plaintiff in a personal injury action such as this "must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result." *Lindsey v. Miami Dev. Corp.*, 689 S.W.2d 856, 861 (Tenn. 1985). Generally, "the causation of a medical condition must be established by testimony from a medical expert," *Miller v. Choo Choo Partners, L.P.*, 73 S.W.3d 897, 901 (Tenn. Ct. App. 2001) (citing *Thomas v. Aetna Life & Cas. Co.*, 812 S.W.2d 278, 283 (Tenn. 1991)), and a medical expert's "testimony is not sufficient to establish causation if it is speculative in nature." *Miller*, 73 S.W.3d at 901 (citing *Primm v. Wickes Lumber Co.*, 845 S.W.2d 768, 771 (Tenn. Ct. App. 1992)). When a person is injured by the negligence of another, "in order for damages to be recoverable, the plaintiff must prove that these damages were a proximate and natural consequence of the tort." *Feathers v. Ryder Truck Rental Co.*, No. 72, 1991 WL 10972, at *3 (Tenn. Ct. App. Feb. 5, 1991). Damages that are "speculative or remote in nature are not allowed as a basis for recovery." *Id.*

Plaintiff contends the accident with Mr. Rutt was the sole cause of her shoulder and neck pain and her migraine headaches, and she denied any exacerbation or aggravation of preexisting conditions and denied that the two additional accidents in which she was involved prior to the trial of this case contributed to her injuries, pain or headaches. Specifically, she testified that prior to this accident, she did not suffer from any of these injuries or pains.

To establish the causation of her medical condition, Plaintiff relied upon the deposition testimony of Dr. Thuy Ngo and Dr. Walter W. Wheelhouse. In reviewing their testimony, we find that both doctors attributed her shoulder and neck pain to the accident at issue, although Dr. Wheelhouse admitted that the second accident could have attributed to or exacerbated her shoulder and neck pain. Significantly, however, neither of Plaintiff's expert witnesses testified that the wreck with Mr. Rutt, the wreck at issue, more likely than not caused Plaintiff's migraine headaches or would cause her to experience migraine headaches in the future. Neither of Plaintiff's expert witnesses opined as to the cause of her migraines.

Although Plaintiff testified at trial that she did not have a history of migraines prior to the accident at issue, the medical records strongly indicate she had a long history of migraines, as did several other members of her family. In fact, on seven different occasions prior to the July 21, 2003 accident with Mr. Rutt, Plaintiff had informed her previous healthcare providers that she suffered from headaches and migraines. Furthermore, Dr. Ngo acknowledged that during her initial visit with him she informed him that she had a history of migraines.

Dr. Ngo also noted her headaches improved over the course of her treatment. His chart noted that on November 23, 2005, Plaintiff's headaches were substantially better than they had been, and Plaintiff had only experienced one migraine headache in the nine months since her last visit. Dr. Ngo's testimony also reveals that as of April 13, 2006, Plaintiff's headaches were "stable," which

he explained meant there was no change in the pattern, frequency, severity, or location of her headaches.

In contrast to her claim that the accident caused her migraines, there is expert testimony in the record that the accident with Mr. Rutt caused her to suffer neck and shoulder injuries and pain. Dr. Wheelhouse, who had evaluated Plaintiff "primarily for her orthopedic injuries" on February 7, 2006, assigned Plaintiff an "eight percent whole person impairment" as a result of her shoulder and neck injuries, explaining that he derived that rating from "the history of the injury, the asymmetric loss of motion of her neck, persistent pain and radicular pain in her right arm." Moreover, he specifically stated that he did not give her any impairment rating for the headaches. In his letter of evaluation, Dr. Wheelhouse wrote that "based upon a reasonable degree of medical certainty . . . [Plaintiff] suffered a significant injury to her head, neck and back and right arm as a result of a rear-end motor vehicle accident collision on 07/21/03." There being no credible evidence in the record to controvert Dr. Wheelhouse's testimony, we find the record supports the finding that Plaintiff's neck and shoulder injuries were caused by the accident with Mr. Rutt.

The trial court's award of damages was based on Plaintiff's two distinct injuries: (1) migraines and (2) neck and shoulder pain. Taking into account all of these injuries, the trial court awarded Plaintiff $6,043.29 for medical expenses she had incurred; $38,000 for past pain and suffering, $15,000 for future pain and suffering, $20,000 for past loss of enjoyment of life, $10,000 for future loss of enjoyment of life, and $15,000 for disability.

Having determined that Plaintiff failed to establish that her migraine headaches were caused by the accident at issue, there is no basis upon which to award Plaintiff damages for her migraine headaches. Accordingly, we must modify the award of damages, awarding her only damages to which she is entitled for shoulder and neck injuries sustained as a result of the accident at issue.

We therefore modify the award of damages by striking the trial court's award of damages and award Plaintiff the following damages:

$ 6,043.29	for medical expenses incurred;
$ -0-	for future medical expenses;
$15,000.00	for past pain and suffering;
$ 7,500.00	for future pain and suffering;
$10,000.00	for past loss of enjoyment of life;
$ 5,000.00	for future loss of enjoyment of life; and
$ 7,500.00	for disability.

IN CONCLUSION

The judgment of the trial court is modified as stated above, for which Plaintiff is awarded damages in the aggregate of $51,043.29. This matter is remanded to the trial court with instructions to enter judgment consistent with this opinion, and for such other proceedings as may be necessary. Costs of this appeal are assessed to Plaintiff.

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FRANK G. CLEMENT, JR., JUDGE